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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 685

WILLIAM H. KNIFFIN, as Trustee in Bankruptcy of C. H. EARLE, INC., Bankrupt,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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May it Please the Court:

Now comes the respondent in the above entitled cause, by its counsel of record, and opposes the petition herein, and asks that same be denied.

Statement of the Case.

This action arises out of a contract entered into between the State of New York and C. H. Earle, Inc., on or about the 3rd day of August, 1928, for the improvement of Jones Beach Causeway in the County of Nassau, in the State of New York. In July, 1929, C. H. Earle, Inc., filed a voluntary petition of bankruptcy. William H. Kniffin and J. Russell Sprague

were duly appointed Receivers by the District Court of the United States for the Eastern District of New York. In November, 1939, C. H. Earle, Inc., was adjudicated a bankrupt and, thereafter, William H. Kniffin was elected and appointed Trustee.

The said Trustee thereafter, and on January 21st, 1931, pursuant to Notice of Intention to File Claim filed on October 8th, 1930, duly filed its claim in the Court of Claims of the State of New York. The claim was subsequently tried in that Court; an appeal taken to the Appellate Division of the Supreme Court, Third Judicial Department; and thence went to the Court of Appeals of the State of New York on Item #12 of the claim alone. The opinion of that Court is reported in 283 N. Y. 317.

Item #12 of the Claim reads as follows:

> "On the 9th day of June, 1930, the State of New York, without lawful right or authority, diverted from the moneys on hand applicable to the payments under said contract the sum of $32,516.73 and paid the same to the Raymond Concrete Pile Company in satisfaction of a judgment of the Court of Claims of the State of New York against the State, and thereby depleted the moneys that should be on hand payable under said contract, for which sum, with interest thereon from the date of its said diversion, the claimant is entitled to an award" (fols. 19-20).

The amount demanded under said Item #12 was $32,506.73, consisting of $30,703.68 principal and $1,803.05 interest. The Court of Appeals modified the judgment by awarding to petitioner the interest item of $1,803.05. Only the principal of $30,703.68, under said Item #12, is here involved.

ARGUMENT.

The determination of the state courts was proper and the petition should be denied.

Petitioner's contention here is that the State diverted the sum of $32,516.73 (because of the allowance of the interest item by the Court of Appeals the sum involved is now $30,703.68), applicable to payments under this contract by the payment of that sum to the Raymond Concrete Pile Company in satisfaction of a judgment in that amount rendered against the State of New York by the Court of Claims.

The Raymond Concrete Pile Company, as a subcontractor for C. H. Earle, Inc., performed a part of the work and furnished part of the labor required by the contract herein of the value of $102,426.36. On the 17th day of May, 1929, C. H. Earle, Inc., assigned to the Raymond Concrete Pile Company out of moneys due or to become due from the State of New York, said sum of $102,426.36 to be paid in three installments, to wit: $41,055.00, $30,703.68 and $30,703.68. The assignment provided that the installments should be paid out of the three succeeding payments due to the contractor from the State. By reason of these assignments there was paid to the Raymond Concrete Pile Company on May 22, 1929, the sum of $41,055, and on July 9, 1929, the sum of $30,703.68. The last amount named in the assignment, the same being the second item of $30,703.68, was not paid to the assignee, but it was paid to C. H. Earle, Inc., and that concern retained and used this money.

Thereafter, the assignee, the Raymond Concrete Pile Company, filed a claim against the State of New

York and recovered the said sum of $30,703.68, with interest thereon from June 17, 1929. At the time this claim was instituted by the assignee, the petition in bankruptcy had been filed. The judgment in favor of the assignee was entered in the office of the Clerk of the Court of Claims on June 3, 1930. This judgment was paid by the respondent on July 9, 1930, the whole amount thereof, including interest, totaling $32,516.73.

At the time of the completion and acceptance of this contract on April 9, 1930, the respondent had on hand and allocated to payments for work done under this contract the sum of $279,942.76. Due to the fact that there were no moneys remaining in the fund for the payment of Court of Claims judgments at the time the judgment of Raymond Concrete Pile Company was entered, the Department of Audit and Control of the State of New York paid the judgment from funds in its hands as trustee, viz., the Common School Fund, and the judgment was assigned to the Comptroller of the State of New York as trustee for that fund. Thereafter, when moneys became available, the Common School Fund was repaid from the fund appropriated for payment of Court of Claims judgments and subsequently the fund for the payment of Court of Claims judgments was reimbursed from the moneys in the hands of the Comptroller and allocated to payments for work done under the contract in question here.

Petitioner's contention is that because of the bankruptcy of the contractor the funds in the hands of the Comptroller became, subject to existing valid assignments and liens, the property of the Trustee

in Bankruptcy for the benefit of all creditors of the contractor, and that the respondent was in error in crediting the amount of the judgment of the Raymond Concrete Pile Company against this fund. Petitioner alleges that by its actions the respondent made itself a preferred creditor.

There is no question but that assignments of moneys to become due are enforceable in the State of New York. (See *Field v. Mayor of New York,* 6 N. Y. 179, *Hinkle Iron Company v. Kohn,* 229 N. Y. 179.) Neither can there be any doubt that a payment by a debtor to an assignor after notice does not discharge the obligation of the debtor to the assignee. (*Weniger v. 14th Street Store,* 191 N. Y. 423; *Prata v. Greene,* 70 App. Div. 224, affirmed 174 N. Y. 535; *Torey v. New Amsterdam Casualty Company,* 124 Misc. 361.)

How can it seriously be contended that the creditors of the bankrupt contractor have been deprived of any rights? A valid non-fraudulent assignment is superior to the claims of subsequent lienors or trustees in bankruptcy. (*Riverside Contracting Co. v. City of New York,* 218 N. Y. 596; *Post & McCord v. City of New York,* 86 Misc. 300.)

In 5 *Corpus Juris,* 966, 967, the following rule is set forth:

> "As against the assignor the assignee becomes the owner of the chose from the time of the assignment, subject to the qualifications heretofore stated. After that time the assignor loses all right of control over the same and will not be allowed to defeat the rights of the assignee, whether the assignment is good at law or only in equity. He has no right to collect or compromise the chose,

nor in any way to discharge the debtor therefrom, nor to modify the chose, as by an extension of time to the debtor. If thereafter the assignor does collect, the chose, the moneys in his hands arising therefrom will be held as trust funds belonging to the assignee, and so a judgment thereafter recovered by the assignor against the debtor will be for the use of the assignee."

See also:

Superior Brassiere Co. v. Zimetbaum, 214 App. Div. 525;

Hofferberth v. Duckett, 162 N. Y. Supp. 167.

The respondent contends that the petitioner, trustee in bankruptcy herein, has no right whatever which can or should be enforced as against the State. Had there been no mistake made and had the payment of $30,703.68 never been made to C. H. Earle, Inc., as heretofore stated, no controversy ever could have arisen. How can the trustee be in any better position simply because the money was mistakenly paid and the respondent later reimbursed itself from moneys on hand due to the contractor? Even though some blame might attach to someone in the respondent's service for making the payment to C. H. Earle, Inc., in the face of the assignment to Raymond Concrete Pile Company, can it be said that C. H. Earle, Inc., is entirely free from blame herein? That concern received the money and presumably used it in its business while knowing that it had no title to the same. However, if it be found that some rights did accrue to the trustee in bankruptcy, can it not be said that the creditors of the bankrupt corporation have suffered no loss and this by reason of Section 108 of the Bankruptcy Act (United States Code Annotated, Title 11, P. 405), reading as follows:

"Section 108. (a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"(b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or without four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy. (July 1, 1898, c. 541, Section 68, 30 Stat. 565.)"

Scant attention should be paid to the fact that the judgment of the Raymond Concrete Pile Corporation was first paid by the respondent from funds held by the Comptroller of the State of New York as trustee, that the trust fund was later reimbursed from the fund appropriated for Court of Claims judgment, and that all this took place previous to charging the amount of the judgment back against the moneys in the hands of the respondent that were due on this particular contract. This procedure should have absolutely no bearing on the controversy for certainly the State of New York from the very day that it mistakenly paid the $30,703.68 to C. H. Earle, Inc., had an absolute right to reimburse itself from any and all funds in its hands due to C. H. Earle, Inc.

In substance the argument of the petitioner amounts to this: because the respondent has mistakenly paid to this claimant the sum of $30,703.68 to which it was not entitled and then reimbursed itself for the same, it should now again be compelled to pay an additional identical amount. Neither equity, justice, law nor reason supports any such position.

The trustee in bankruptcy and the petitioner herein in his capacity as a representative of the creditors of C. H. Earle, Inc., cannot reasonably contend that any harm has come to the creditors. The bankrupt corporation had the use and benefit of the $30,702.68 and indirectly, of course, all creditors received a similar benefit. We respectfully submit, therefore, that this cause presents no question sufficiently substantial to warrant review by this Court.

Opinions Below.

The opinion of the Court of Appeals of the State of New York is reported in 283 N. Y., at page 317. The decision of that Court modified, and as modified, affirmed the decision of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, reported in 257 App. Div., at page 43. The petitioner's motion for reargument in the Court of Appeals of the State of New York was denied, as reported in 284 N. Y. 25 (Advance Sheet No. 79, dated November 2, 1940).

Dated: January 24, 1941.

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